(2)

No. 99-1551

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

SEMTEK INTERNATIONAL INCORPORATED,
Petitioner,

v.

LOCKHEED MARTIN CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Special Appeals of Maryland

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Hanna v. Plumer*, 380 U.S. 460 (1965), Federal Rule of Civil Procedure 41(b) governs the preclusive effect of a federal diversity court's dismissal on statute of limitations grounds.

PARTIES TO THE CASE

The petitioner, appellant below, is Semtek International Incorporated, referred to herein as "Semtek." The respondent, appellee below, is Lockheed Martin Corporation, referred to herein as "Lockheed."

Pursuant to this Court's Rule 29.6, Lockheed states that it has no parent company and that no publicly held company owns more than 10% of Lockheed's stock.

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STATEMENT OF THE CASE

This case originates with the decision of petitioner Semtek International Inc. ("Semtek") to bring its suit against Lockheed Martin Corporation ("Lockheed") in California after the California limitations period had expired. When this strategic misstep led to dismissal of its California action by a federal diversity court, Semtek sought to rectify the situation by bringing precisely the same lawsuit against Lockheed again, this time in a forum with a more generous statute of limitations. But as the court below explained, "Federal law . . . does not permit a plaintiff to shop indefinitely for favorable statutes of limitations in every state where personal jurisdiction over a defendant might be found." Pet. App. 20a-21a (internal quotation marks omitted).[1]

Instead, Federal Rule of Civil Procedure 41(b) gives res judicata effect to federal court statute of limitations dismissals, and thus bars exactly the type of duplicative litigation at issue here. Federal Rule 41(b) governs this case under well-established law, and there is no lower court conflict on this point. That Semtek is precluded from litigating in Maryland a case that it has already lost in California district court is an unexceptional and entirely predictable application of Rule 41(b). Nothing about this result warrants the Court's attention.

A. The California Proceedings.

In February 1997, Semtek filed its first lawsuit against Lockheed in California state court, alleging business torts. Lockheed, an out-of-state defendant, removed the case to federal district court based on diversity of citizenship. Pet.

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[1] The abbreviation "Pet. App." is used throughout to refer to the appendix to the petition for certiorari.

App. 2a.[2]

Because Semtek's own complaint and representations established that California's two-year statute of limitations had expired, Lockheed moved the district court to dismiss the action on limitations grounds. The district court granted the motion and dismissed the action. In its final judgment, issued on May 8, 1998, the district court specified that its dismissal was "on the merits" and "with prejudice."' Pet. App. 2a-3a. At the time, Semtek did not object to the court's decision to render a dismissal "on the merits," and it did not seek to amend or clarify the judgment under the Federal Rules of Civil Procedure.

Semtek appealed the statute of limitations dismissal to the Ninth Circuit. Semtek did not contend that the district

[2] Petitioner takes this opportunity to argue that because it subsequently served an in-state defendant (a former Lockheed employee), "there was no evident basis for removal." Pet. 3. Semtek advanced this flawed argument in an unsuccessful effort to have its case remanded to California state court and there is no need to refight the battle here. Lockheed simply notes, again, that complete diversity was at all times present in the California action. Because Semtek failed to serve the Lockheed ex-employee who resided in California before removal, there was, contrary to Semtek's argument, *see* Memorandum in Support of Motion to Remand (filed May 5, 1997, C.D. Cal.), no "properly joined and served . . . defendant [who was] a citizen of the State in which [the] action [was] brought" at the time of removal, *see* 28 U.S.C. § 1441(b), and removal was therefore proper. The district court denied Semtek's remand motion, and Semtek did not appeal.

Nor is there any basis for petitioner's suggestion that Lockheed somehow abused Semtek's "courtesy" in removing the case before Semtek served its in-state defendant. Pet. 3, 26-27 n.21. Lockheed did not learn of Semtek's complaint by receipt of a "courtesy copy" from Semtek, but instead obtained the complaint from the court record after one of its outside counsel had noted the filing of the action.

court erred in rendering a judgment "on the merits" or object in any way to the form of the judgment. On February 25, 1999, the Ninth Circuit affirmed the district court dismissal. Pet. App. 3a. Semtek did not petition for certiorari from that judgment.

B. The Maryland Proceedings.

While its Ninth Circuit appeal was pending in July 1997, Semtek filed its second lawsuit against Lockheed in Maryland state court, raising business tort claims identical to those it alleged in California. Relevant Maryland law provided for a three-year statute of limitations. Pet. App. 3a.

Lockheed sought an injunction in the California federal district court barring Semtek from litigating in Maryland claims that had already been presented in the California proceedings. The California district court was "not convinced that the single action filed by [Semtek] in Maryland rises to the level of vexatious litigation" that would warrant relief under the All Writs Act, 28 U.S.C. §1651(a), and declined to exercise its discretion to enjoin the Maryland litigation. Pet. App. 4a-5a.

Lockheed also removed the Maryland state court case to federal district court in Maryland. Relying on then-current Fifth Circuit precedent, Lockheed asserted as grounds for removal that it would raise the affirmative defense of res judicata based on the California federal district court judgment, and thus present a federal question for review. The Maryland district court disagreed with Lockheed's argument and the Fifth Circuit case law, and granted Semtek's motion to remand the case to Maryland state court. Pet. App. 4a-5a.[3]

[3] It was not until after Lockheed sought removal that this Court resolved the lower court conflict on whether federal removal could be predicated on an alleged affirmative federal defense. *See Rivet v. Regions Bank*, 522 U.S. 470 (1998) (affirmative federal defense not grounds for removal).

With the case returned to Maryland state court, Lockheed moved to dismiss on res judicata grounds. Contrary to petitioner's suggestion, Pet. 4 & n.3, Lockheed did not concede that Semtek's action was timely under the three-year Maryland limitations period; in fact, it is Lockheed's position that Semtek's complaint is barred by the Maryland statute of limitations. But for purposes of its motion to dismiss, Lockheed argued only that the California district court's dismissal precluded Semtek from filing the same claim in Maryland. Opposing the motion, Semtek argued that the statute of limitations dismissal was not "on the merits" and thus not entitled to res judicata effect.

The Maryland trial court agreed with Lockheed and granted its motion to dismiss. Pet. App. 36a-47a. The court began by identifying the Federal Rule of Civil Procedure that speaks to the preclusive effect of statute of limitations dismissals: Federal Rule 41(b), which provides in relevant part that "unless the Court in its order for dismissal otherwise specifies, a dismissal . . . other than [one] for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits." Pet. App. 39a. The court held that the preclusive effect of the California district court dismissal was governed by the Federal Rule directly on point, rather than by the California state law urged by Semtek. For this point, the court relied on uniform federal and state case law applying Rule 41(b), where relevant, to measure the preclusive effect of federal diversity court dismissals. Pet. App. 40a-46a. And under the "plain language" of Rule 41(b), the court concluded, the California district court's limitations dismissal was an "adjudication on the merits" entitled to res judicata effect. Pet. App. 39a.

Semtek appealed the trial court judgment to the intermediate Maryland appellate court. It also, for the first time, moved in California to amend the federal district court's by then 18-month old judgment to specify that the limitations dismissal was *not* on the merits – which would mean that

under the terms of Rule 41(b), it would not be treated as a merits adjudication with res judicata effect. With full knowledge that the Maryland action had been dismissed, the California federal district court denied the request for relief. The Ninth Circuit also denied Semtek's motions, on procedural grounds. Pet. App. 11a-12a.

C. The Decision Below.

The Maryland Court of Special Appeals affirmed the trial court decision applying Federal Rule of Civil Procedure 41(b) and giving the California district court dismissal res judicata effect. Reviewing extensive and consistent case law on precisely the question presented here – whether Federal Rule 41(b) governs the preclusive effect of a federal diversity court's dismissal on limitations grounds – the court concluded that the Federal Rule, and not California res judicata law, governs. Pet. App. 12a-16a, 19a-21a, 23a-30a. And under the plain terms of Rule 41(b), the court held, California district court's limitations dismissal, which actually specified that it was "on the merits and with prejudice," was clearly an "adjudication on the merits" entitled to res judicata effect. Pet. App. 8a-12a.

The appellate court also rejected Semtek's argument for application of state law on the grounds that it constituted an impermissible collateral attack on the California district court judgment. Pet. App. 31a-32a. Semtek's argument, the court recognized, turned on the premise that the California district court, sitting in diversity, was bound under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to apply the res judicata law of its forum state. Under *Erie*, according to Semtek, the California federal court should have applied California law and held that its limitations dismissal was *not* on the merits – and because California law should have governed in the federal district court, Semtek argued, it should govern in Maryland, as well. Pet. App. 31a. The court rejected this argument on the merits. But even if it were correct, the court held,

> Semtek's appeal to this court is totally inappropriate. If the federal district court judgment was in any way in error, Semtek's remedies were 1) post-trial motions to the federal district court itself, 2) an appeal to the [Ninth Circuit], and 3) a petition for *certiorari* to the Supreme Court of the United States. It is not the job of an intermediate appellate court in Maryland . . . to reverse, to overrule, to modify, to alter, to amend, or to reform the judgment of the United States District Court for the Central District of California.

Pet. App. 32a.

Semtek petitioned for discretionary *certiorari* review in Maryland's highest court of appeals. The Court of Appeals denied review. Pet. App. 35a.

REASONS FOR DENYING THE PETITION

Though it is not apparent from the petition, this is a case about application of a Federal Rule of Civil Procedure – Rule 41(b), governing the effect of dismissals – to a federal diversity judgment. Once the issue in this case is properly identified, petitioner's "conflict" simply evaporates. There is no disagreement in the courts over application of the Federal Rules of Civil Procedure, where relevant, to determine the preclusive effect of a federal diversity judgment – which is not surprising, as this issue is controlled by the Court's decision in *Hanna v. Plumer*, 380 U.S. 460 (1965). Nor is there any question as to the validity or meaning of Rule 41(b) as it pertains to dismissals on statute of limitations grounds. These are the only issues actually implicated by this case, and neither of them merits this Court's review.

Even if the Court were inclined to revisit *Hanna* and its implications for the Federal Rules of Civil Procedure, this case would not provide an opportunity to do so. The res judicata issue here was resolved by the California district court, when it dismissed Semtek's case "on the merits" con-

sistent with Rule 41(b). Under well-established precedent of this Court, the proper avenue for challenging that decision would have been appeal and certiorari in the California proceedings. Petitioner's collateral attack in the Maryland litigation was barred, as the Maryland court properly held, and the question petitioner presents is not before the Court in these proceedings.

I. THERE IS NO CONFLICT ON THE ISSUE PRESENTED BY THIS CASE: APPLICATION OF A FEDERAL RULE OF CIVIL PROCEDURE TO A FEDERAL DIVERSITY ACTION.

In support of its position that California law should govern the res judicata effect of the federal district court dismissal, petitioner relies virtually exclusively on the 1874 case of *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130. But *Dupasseur* addresses a question entirely different from the one presented here.

Whether state or federal law should dictate the preclusive effect of a federal diversity judgment is not really one question, as petitioner would have it, but two. The first arises when a court must decide, in the absence of a relevant Federal Rule of Civil Procedure, whether state law or federal common law should fill the gap and supply the general res judicata principles applicable to a diversity judgment. That was the question decided in *Dupasseur*, which predated the Federal Rules of Civil Procedure by a good half-century. But it is not a question presented by this case

The other question arises when a Federal Rule of Civil Procedure – in this case, Rule 41(b) – speaks directly to the res judicata issue in dispute, so that the choice is between state law and application of a *Federal Rule* to a prior federal diversity judgment. On that question, the only one implicated by this case, *Dupasseur* has no bearing. And on that question, there is no disagreement in the lower courts: under this Court's decisions in *Hanna v. Plumer*, 380 U.S. 460

(1965), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), the governing law is the relevant Federal Rule.

A. This Case Is Controlled by *Hanna v. Plumer*.

The first step of the choice-of-law analysis in this case is not disputed. The "recognizing" court – here, the Maryland court – applies the res judicata law that would govern in the prior "rendering" court – here, the California federal district court. "[A] court must give a foreign judgment no more and no less force and effect than would the court which rendered it." Brief of Appellant Semtek (filed Nov. 30, 1998, Md. Ct. Sp. App.) at 19 (emphasis omitted) ("Brief of Appellant"); *see also* Graham C. Lilly, *The Symmetry of Preclusion*, 54 Ohio St. L.J. 289, 315-16 (1993) ("It is generally the practice of courts faced with determining the effects of a judgment to examine the res judicata law of the rendering court.").

But that leaves unanswered the "ultimate" question of what law governs in the rendering federal diversity court, Lilly, *supra*, at 319, and it is at this second step of the analysis that Semtek makes its argument for California law. Under *Erie Railrodd Co. v. Tompkins*, 304 U.S. 64 (1938), petitioner argues, the rendering diversity court must look to *state* res judicata law, at least so far as that law is deemed "substantive" for *Erie* purposes. Because the law governing the scope of a judgment is considered "substantive" under *Erie*, petitioner contends, *California* law governs in the rendering diversity court – and thus in Maryland, as well. Brief of Appellant at 21-22; Pet. App. 30a-34a.[4]

Whatever merit it might have in a different context, *see infra* at 14, Semtek's *Erie* argument has no application here,

[4] Lockheed does not concede that the res judicata issue in dispute is "substantive" for *Erie* purposes. But because Semtek's entire *Erie* analysis has no bearing on this case, as shown below, the Court need not reach the question here.

for the simple reason that this is not an *Erie* case. Because there is a Federal Rule of Civil Procedure – Rule 41(b) – directly on point, the case that governs is not *Erie* but *Hanna v. Plumer*, 380 U.S. 460 (1965), and the law that governs the res judicata effect of the diversity judgment is not state law but the Federal Rule.

In *Hanna*, the Court rejected the very argument on which Semtek's position depends: that a federal diversity court must apply state law to an issue "substantive" under *Erie*, even if a Federal Rule of Civil Procedure covers the same issue. The "fundamental" problem with this argument, the Court held, was the "incorrect assumption that the rule of *Erie R. Co. v. Tompkins* constitutes the appropriate test of the validity and therefore the applicability of a Federal Rule of Civil Procedure." 380 U.S. at 469-70. The traditional *Erie* inquiry is simply inapposite when a "situation is covered by one of the Federal Rules." *Id.* at 471.[5]

Instead, the Court held in *Hanna*, the validity and applicability of a Federal Rule of Civil Procedure are measured under the Rules Enabling Act, 28 U.S.C. § 2072, which pro-

[5] This conclusion is a matter of straightforward statutory construction. *Erie* rests, first and foremost, on the Rules of Decision Act, 28 U.S.C. § 1652, which provides in relevant part that "[t]he laws of the several states, except where [statutes of the United States] shall otherwise require or provide, shall be regarded as rules of decision" in federal courts. In *Erie*, the Court interpreted the term "laws of the several states" to include common law as well as statutory law, so that under the Rules of Decision Act, federal courts sitting in diversity were required to apply state law to most substantive issues before them. *Erie*, 304 U.S. at 71-73; *see generally* 19 Charles Alan Wright et al., *Federal Practice and Procedure* § 4502, at 4 (2d ed. 1996) ("Wright & Miller"); *id.* § 4503, at 18-23. But when a Federal Rule is at issue, as *Hanna* recognized, neither the Rules of Decision Act, which specifically exempts from its scope matters covered by another federal law, nor the Court's reading of that statute in *Erie*, controls. 380 U.S. at 471; *see generally* 19 Wright & Miller § 4508, at 246-49.

vides for a uniform system of rules governing practice and procedure in the federal courts. So long as a Federal Rule is authorized under the Constitution and the Rules Enabling Act, it applies to a federal diversity judgment – regardless of what might have been the outcome under the traditional *Erie* inquiry. 380 U.S. at 471. And Congress' rulemaking authority under the Constitution and the Act is broad enough to reach not only matters "procedural" for *Erie* purposes, but also matters "which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." *Id.* at 471-72. Even where they might "incidentally affect litigants' substantive rights," that is, the Federal Rules are presumed valid and applicable. *See Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5-6 (1987) (applying *Hanna* and holding that Federal Rule of Appellate Procedure, rather than contrary state law, governs federal diversity judgment). In short, a Federal Rule that covers the issue "trumps" traditional *Erie* analysis and effectively preempts inconsistent state preclusion law. *See* Howard M. Erichson, *Interjurisdictional Preclusion*, 96 Mich. L. Rev. 945, 1006 (1998).

Because the applicability of a Federal Rule of Civil Procedure is a Rules Enabling Act question, *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), obviously has no relevance when, as in this case, there is a Federal Rule at issue. *Dupasseur*, of course, did not purport to interpret the Rules Enabling Act, which was enacted sixty years later in 1934. Nor could it involve any of the Federal Rules of Civil Procedure, promulgated in 1938. The point here is not that *Dupasseur* has been overruled *sub silentio* or somehow undermined by later developments. *See* Pet. 13 (arguing that "status" of *Dupasseur* is unclear). Quite apart from its status in other contexts, *Dupasseur* simply has no application when the choice of res judicata principles is not between state and federal *common* law but rather between state law and a *Federal Rule of Civil Procedure*, where the Rules Enabling Act is controlling.

In sum, *Hanna* makes clear that petitioner's *Erie* argument is entirely irrelevant to this case, and eliminates with it any basis for applying California state law. Federal Rule of Civil Procedure 41(b) "control[s] the issue" in dispute here, *Burlington Northern*, 480 U.S. at 5, providing that a statute of limitations dismissal is "on the merits" for res judicata purposes unless otherwise specified. *See infra* at 16. Under *Hanna*, Rule 41(b) and not state law properly applied when the district court ruled that its limitations dismissal was "with prejudice" and "on the merits," instead of specifying that its order should have no res judicata effect. Pet. App. 58a-59a. Because the Federal Rule rather than state law governed this res judicata issue in the rendering diversity court, the Maryland recognizing court had no reason to "look behind" the federal court judgment to California state law. App. 16a.

B. The Lower Courts Are In Agreement That a Controlling Federal Rule of Civil Procedure Governs the Res Judicata Effect of a Diversity Judgment.

The decision below is entirely consistent with other decisions addressing the question actually presented by this case: whether a controlling Federal Rule of Civil Procedure governs the res judicata effect of a federal diversity judgment. On this point, there is no disagreement among the courts, and petitioner cites no case in which a Federal Rule speaking to the disputed issue is actually rejected in favor of state res judicata law. Instead, the courts uniformly apply relevant Federal Rules to determine the preclusive effect of federal diversity judgments.

Kern v. Hettinger, 303 F.2d 333 (2d Cir. 1962), for instance, which Semtek cites as a leading case for application of federal law generally, Pet. 14, is actually a Rule 41(b) case. In *Kern*, the court held that Rule 41(b) governed the preclusive effect of a dismissal for want of prosecution by a California district court sitting in diversity. Because Rule 41(b) spoke directly to the question, the court was able to

summarily reject an *Erie* argument for application of California law: "The *Erie* doctrine is not applicable here." 303 F.2d at 340 (citation omitted). Likewise, two of the cases on which the Maryland court below relied most heavily – *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180-82 (4th Cir. 1989), and *Andes v. Paden, Welch, Martin & Albano P.C.*, 897 S.W.2d 19, 21-23 (Mo. Ct. App. 1995) – also turn on application of Rule 41(b), and hold that the Federal Rule, rather than state law, measures the preclusive effect of dismissals by federal diversity courts. Pet. App. 19a-21a, 29a-30a.

The pattern holds through all of the cases cited by petitioner. In every case in which the court identifies a Federal Rule that covers the disputed res judicata issue, the court applies the Federal Rule and not state law to the prior diversity judgment. *See PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 (2d Cir. 1983) (applying Rule 41(b)); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 832 (6th Cir. 1978) (applying Rule 41(b)); *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) (applying Rule 41(b)); *NAACP v. Hunt*, 891 F.2d 1555, 1560 (11th Cir. 1990) (discussing state law but applying Rule 41(b)); *Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1470 (11th Cir. 1986) (applying Rule 41(b)); *Collins v. Sigmon*, 385 S.E.2d 835, 837 (S.C. 1989) (applying Rule 41(b)); *Martin-Trigona v. Gouletas*, 433 N.E.2d 1132, 1134 (Ill. App. Ct. 1982) (applying Rule 41(b)); *Dasha v. Maine Med. Ctr.*, No. 93-3856-G, 1996 WL 365995, at *2-3 (Mass. Super. Ct. June 25, 1996) (applying Rule 41(b)); *see also Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1333 (10th Cir. 1988) (applying federal law because issue "analogous" to that covered by Rule 13(a)).

Even in cases that do *not* involve a controlling Federal Rule, courts have clarified that federal and not state law would govern diversity judgments *were* such a Rule on point. *See Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 42 n.3

(2d Cir. 1986) (Newman, J.) (specifying that res judicata questions covered by Federal Rules of Civil Procedure are controlled by federal law); *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 345 n.1 (2d Cir. 1995) (same); *Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (Federal Rules presumptively applicable where interpreted to cover issue in dispute); *see also id.* at 1507 (Scalia, J., concurring in result).[6]

In short, contrary to petitioner's suggestion, Pet. 13, there is *no* court in which it appears that this case would have been decided differently. Every court that has addressed the issue has held that federal law determines the preclusive effect of a federal diversity judgment where a Federal Rule of Civil Procedure speaks directly to the res judicata question in dispute. The lesson of *Hanna* is clear, *see supra* at 9-11, and the commentators – the same ones cited by petitioner – treat this as a straightforward and settled matter. Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976) ("To the extent . . . that the Federal Rules of Civil Procedure do speak about the preclusive effect of federal adjudications, they speak authoritatively . . . . They have been given that effect by state and federal courts alike."); Erichson, *supra*, at 1006 (under *Hanna*, Federal Rule trumps state res judicata law); Lilly, *supra*, at 320-21 (where Federal Rule speaks to res judicata issue, Rule is uniformly enforceable); Restatement (Second) of Judgments § 87, at 317 (1982) (Federal Rule governs so long as valid exercise of rulemaking author-

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[6] In *Hillary v. Trans World Airlines, Inc.*, 123 F.3d 1041, 1043-44 (8th Cir. 1997), the court appears to have applied state law to determine the preclusive effect of a federal diversity court dismissal on limitations grounds, reasoning that res judicata issues are "substantive" for *Erie* purposes. The court did not, however, recognize that Federal Rule 41(b) addresses this issue, so it had no opportunity to apply the *Hanna* rule that issues validly regulated by the Federal Rules are not subject to the traditional *Erie* inquiry and are controlled by federal law. *See supra* at 9.

ity).

Semtek generates its purported "conflict" only by relying on cases that present a very different question. If there is any "confusion" in this area, Pet. 9, it arises not in cases like this one, but only when no Federal Rule of Civil Procedure covers the res judicata issue in dispute, so that the question is whether state law or federal *common law* applies to a federal diversity judgment. It is only in this distinct class of cases – cases involving non-Rules issues such as mutuality and privity – that courts could conceivably be thought obliged to look to state res judicata law that is "substantive" under the traditional *Erie* inquiry. *See supra* at 8-10; Lilly, *supra*, at 322; *Semler v. Psychiatric Institute*, 575 F.2d 922 (D.C. Cir. 1978) (applying state res judicata law, in absence of Rule, under *Erie*). And it is only to this class of cases that *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1874), might be thought to apply. *See supra* at 10; 18 Wright & Miller § 4472, at 732. Petitioner has conflated two different sets of cases controlled by different legal principles. *See* Lilly, *supra*, at 320-21 (distinguishing cases involving Federal Rules from those involving federal common law, and describing latter as raising difficult questions); Erichson, *supra*, at 1006-07 (distinguishing cases).

Because the set of cases in which no Federal Rule controls raises a question very different from that presented here, this case cannot be a vehicle for resolving any confusion that lingers in non-Rules cases.[7] Where a Federal Rule

[7] Even in cases in which no Federal Rule controls, it is worth noting, there is considerably less disagreement on the choice-of-law question than petitioner suggests. In fact, the clear majority rule is that federal law governs the effect of federal diversity judgments as a general matter, without regard to the existence of a relevant Federal Rule. *See, e.g., Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 962 (3d Cir. 1991) (majority of circuits apply federal law); *Havoco of Am. v. Freeman, Atkins & Coleman, Ltd.*, 58 F.3d 303, 307 (7th Cir. 1995) (same). Moreover, the trend is in the direction of federal law, with circuits that had once applied state law increasingly disposed toward federal law. *See Lubrizol*, 929 F.2d at 962-63 (declining to resolve issue, but noting that prior cases applying state law did not address question and may have been superseded by *Hanna v. Plumer*); *Gelb*, 798 F.2d at 42 n.3 (suggesting that older cases applying state law have been "eroded" by more recent developments). Petitioner avoids this conclusion only by listing as undecided circuits that have in fact given strong indications that they have or will join the majority of courts applying federal law. *See Havoco*, 58 F.3d at 307 ("We apply, as do the majority of the circuits, federal principles of preclusion."); *Harborside Refrigerated Servs., Inc. v. Vogel*, 959 F.2d 368, 373 (2d Cir. 1992) ("we have suggested that 'federal law should determine the preclusive effect of a federal judgment,' and several district courts have taken this course . . . [but] the outcome in this case does not require us to decide the question" (citations omitted)); *In re Kaplan*, 143 F.3d 807, 815-16 & n.15 (3d Cir. 1998) (applying federal law to diversity judgment in subsequent bankruptcy action, and finding support in "rationale advanced by the majority of circuits in holding that federal law governs the preclusive effect of a diversity judgment in a subsequent diversity suit").

speaks to the res judicata effect of a federal diversity judgment, as Rule 41(b) does here, then it is clear under *Hanna* that the Federal Rule governs. There is no disagreement among the lower courts on this point, and the commentators confirm their judgment. On the issue actually presented by this case, there is simply no need for any further guidance from this Court.

C. Federal Rule of Civil Procedure 41(b) Is a Valid Exercise of Congress' Rulemaking Authority and Controls the Preclusive Effect of a Dismissal on Statute of Limitations Grounds.

It remains only to clarify that Federal Rule of Civil Procedure 41(b) does, in fact, "control the issue" in this case, triggering the *Hanna* standard and the case law described above. *See Burlington Northern*, 480 U.S. at 5. First, there

is no question but that Rule 41(b) represents a "valid exercise of Congress' rulemaking authority" under the Constitution, delegated to the Supreme Court in the Rules Enabling Act. *Id.* As this Court has explained, any challenge to the validity of a Federal Rule of Civil Procedure "has a large hurdle to get over." *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 552 (1991) (sustaining Rule 11). "[O]nly if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions" can a Federal Rule be deemed invalid. *Id.* (quoting *Hanna*, 380 U.S. at 471). No Federal Rule has ever been held invalid under this standard, *see* 19 Wright & Miller § 4504, at 48, and no court has even suggested that Federal Rule 41(b) might exceed the scope of the Rules Enabling Act.

Second, it is clear that Rule 41(b) speaks directly to the disputed issue in this case. The res judicata question here is the preclusive effect to be accorded a dismissal on statute of limitations grounds. By its plain terms, Federal Rule 41(b) covers this issue, and petitioner can cite no court that has held otherwise.

The terms of Rule 41(b) are perfectly clear: "Unless the court in its order for dismissal otherwise specifies, a dismissal . . . other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits." A dismissal that falls under one of the three enumerated exceptions precludes only relitigation of the same issue – jurisdiction, venue, or joinder – in a subsequent action. But any other dismissal is "on the merits" unless otherwise expressly provided, so that it has claim preclusive and not merely issue preclusive effect. Statute of limitations dismissals do not fall within any of the Rule's listed exceptions. Nor did the rendering district court in this case specify something less than claim preclusive effect; on the contrary, Judge Collins held expressly that

her limitations dismissal was "on the merits" and "with prejudice." Pet. App. 58a-59a. The Maryland court properly construed the "plain language" of Rule 41(b) to cover the issue here and dictate that the statute of limitations dismissal be accorded res judicata effect. Pet. App. 8a (quoting Maryland trial court).

There is no disagreement in the courts on this question. Instead, there is a long line of cases reaching the same conclusion as the Maryland court below: that limitations dismissals are "on the merits" and claim preclusive under the terms of Federal Rule 41(b). *See* Pet. App. at 23a-25a (citing cases); *see also, e.g., Shoup*, 872 F.2d at 1180 (citing additional cases); *PRC Harris*, 700 F.2d at 896-97; *Andes*, 897 S.W.2d at 22-23 (citing additional cases). Petitioner cites no case law to the contrary, and relegates the issue to a footnote in its brief.[8] On this point, the law is settled: Rule 41(b)

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[8] In its footnote, Semtek does refer to *Reinke v. Boden*, 45 F.3d 166, 171 (7th Cir. 1995), in which the court in dicta recognized some academic criticism of the uniform case law applying Rule 41(b) to statute of limitations dismissals. Pet. 28-29 n.22. Both *Reinke* and petitioner rely principally on Wright & Miller, which suggests that Rule 41(b) "need only mean" that dismissal on statute of limitations grounds precludes relitigation of the same issue. 18 Wright & Miller § 4441, at 373. But that is plainly inconsistent with the text of the Rule, which specifically enumerates those dismissals to be accorded issue rather than claim preclusive effect, and does not include limitations dismissals in that category. *Supra* at 16-17. The real focus of the Wright & Miller critique seems to be not court interpretation of Rule 41(b), but the substantive policy decision of the Advisory Committee to give statute of limitations dismissals res judicata effect under the Rule. 18 Wright & Miller § 4441, at 372-73 (statute of limitations issues are "too important" to be resolved by reference to Rule 41(b)). Even if that criticism were warranted – and Lockheed does not believe that it is – the language of the Rule is clear, and petitioner's policy disagreement with the Rule is not, of course, grounds for granting certiorari.

"controls" the preclusive effect of a statute of limitations dismissal for purposes of *Hanna* and *Burlington Northern*, rendering *Erie* and state preclusion law inapplicable.

II. THE CALIFORNIA FEDERAL DISTRICT COURT DECISION TO DISMISS SEMTEK'S CLAIM "ON THE MERITS" IS NOT SUBJECT TO COLLATERAL ATTACK IN THE MARYLAND COURTS.

The Maryland appeals court rejected Semtek's argument not only because it is erroneous, but also because it amounts to an impermissible collateral attack on the judgment of the California federal district court. Pet. App. 31a-32a. The Maryland court was right on both counts. Under petitioner's theory, Judge Collins of the federal district court should have measured the effect of her statute of limitations dismissal by looking to California res judicata law, which does not treat limitations dismissals as judgments on the merits with claim preclusive effect. Instead, Judge Collins determined that her statute of limitations dismissal was "on the merits," consistent not with California law but with Federal Rule 41(b). As decisions of this Court make clear, the avenue for challenging that judgment was a motion addressed to Judge Collins, an appeal to the Ninth Circuit and a petition for certiorari in that case – and not a collateral attack in separate litigation in Maryland.

Federal Rule 41(b) departs from traditional res judicata practice in one respect important to this case. Most res judicata issues can be litigated only in the second, recognizing court, because that is where they arise for the first time. Privity is a good example: by definition, whether a party sought to be estopped is in "privity" with a party to prior litigation is a question that cannot be asked or answered until subsequent litigation is initiated. Thus, the initial decision naturally does not speak to the issue. The preclusive effect of a dismissal under Rule 41(b) is different. Under Rule 41(b), it is the *rendering* court that has the authority to determine the preclusive effect of its own statute of limitations

dismissal (as well as all other dismissals not specifically excepted from the scope of the Rule). This means that litigants have the opportunity to contest the preclusive effect of a limitations dismissal before the rendering court itself and, if unsuccessful, to appeal the issue in those proceedings. Having had that opportunity already, they are precluded from raising the same issue in subsequent proceedings by way of collateral attack.

The Supreme Court addressed just this issue in *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). Prior litigation in *Treinies* had produced two competing state court judgments: a Washington state court decision awarding stock to one claimant, and then an Idaho court decree distributing the same stock to the other claimant. This Court held that the Idaho judgment was entitled to res judicata effect in a subsequent federal interpleader action, despite the existence of the Washington ruling. *Id.* at 76-78. The rendering Idaho court had itself decided the res judicata question at issue, the Court reasoned, when it held that the Washington court lacked jurisdiction to consider the matter. "If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings." *Id.* at 77. The decision of the rendering court, having effectively decided the res judicata issue before the recognizing court, was "unassailable collaterally" in the subsequent proceeding. *Id.* at 78. *See also Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931) (where rendering court itself decides res judicata issue, with right to appeal in that proceeding, party is precluded from litigating same issue collaterally in recognizing court).

The same rule governs here. The rendering California court itself resolved the contested res judicata issue in this case when it deemed its limitations dismissal "on the merits," consistent with Rule 41(b). Semtek's opportunity to challenge that decision came in the California proceedings, and in the California proceedings alone. *See Cemer v. Mara-*

thon Oil Co., 583 F.2d 830, 832 n.1 (6th Cir. 1978) (whether rendering federal diversity court's dismissal properly covered by Rule 41(b) must be raised on direct appeal from that dismissal and not collaterally in recognizing court); *Nasser v. Isthmian Lines*, 331 F.2d 124, 128 (2d Cir. 1964) (under Rule 41(b), "questions relating to the propriety of [an] earlier dismissal which clearly could have been litigated in that action if raised in a proper and timely manner are . . . foreclosed" in recognizing court); *Kudaroski v. Hellmuth*, No. 79-2489-C, 1981 U.S. Dist. LEXIS 9476, at *4 n.2 (D. Mass. Mar. 16, 1981) (propriety of dismissal under Rule 41(b) must be challenged on direct appeal).

Indeed, Semtek availed itself of its opportunity to challenge the district court decision – though not until its Maryland action was dismissed by the trial court on res judicata grounds – when it sought to have the ruling modified to specify that the judgment was not "on the merits." Pet. App. 11a-12a. In its motion to the district court, Semtek argued expressly that the court was required to apply *California* res judicata law to its dismissal: "this . . . court sitting in diversity must give its own judgment the same scope and effect as if it had been entered by a California state court subject to California res judicata law." Memorandum in Support of Motion to Amend Judgment (filed Oct. 21, 1998) at 2. Judge Collins denied Semtek's motion, relying in part on *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894 (2d Cir. 1983), one of the long line of cases applying Rule 41(b) rather than state law to measure the preclusive effect of a diversity court's dismissal on limitations grounds. Ruling on Plaintiff's Request for Judicial Notice Re: Motion to Amend Judgment (In Chambers) (Nov. 4, 1998); *see supra* at 12 (discussing *PRC Harris*).

Petitioner did not raise any issue regarding the preclusive effect of the dismissal in its appeal to the Ninth Circuit, and the district court decision was upheld in all respects. Pet. App. 3a. Semtek did not petition for certiorari. Semtek's

"right to review" any purported error as to the limitations dismissal ended with the California proceedings, *see Treinies*, 308 U.S. at 77, and the Maryland court properly rejected Semtek's collateral attack on the district court order. Pet. App. 31a-32a.[9]

The bar on collateral attacks does not mean, of course, that this Court will be precluded in future cases from considering whether Federal Rule 41(b) governs the res judicata effect of a federal diversity court's dismissal on statute of limitation grounds. For the reasons discussed in Part I of this brief, this is not a question with which the Court need concern itself. But if the Court did want to reach the issue, it could do so simply by granting certiorari in a case in which appeal is properly taken from the *rendering* court's dismissal "on the merits" under Rule 41(b). Certiorari from the *California* proceedings, that is, could have properly presented the Rule 41(b) issue, had the issue been preserved; certiorari from the *Maryland* proceedings would not.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

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[9] Petitioner may argue, as it did below, that the California district court did not intend to resolve the res judicata issue with its dismissal "on the merits," relying on language used by Judge Collins months later when she denied Lockheed's request that she enjoin the Maryland litigation. The Maryland court properly rejected that argument. *See* Pet. App. 9a-11a. Judge Collins herself, the court noted, warned that her discussion of her prior order was "dicta" without even "persuasive authority." *Id.* at 10a. Judge Collins subsequently denied Semtek's request that she amend the order to reflect that her dismissal was *not* on the merits, with full knowledge that her dismissal had been given preclusive effect in the Maryland litigation. *Id.* at 11a. Especially in light of these circumstances, the court held, the meaning of the original dismissal "on the merits" must be located in the plain terms of that order itself. *Id.* at 10a-11a.

Respectfully submitted,

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